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News from Nowhere: The Debased Debate on Civil Justice

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NEWS FROM NOWHERE: THE DEBASED DEBATE ON CIVIL JUSTICE*

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Public discussion of our civil justice system resounds with a litany of quarter-truths: America is the most litigious society in the course of all human history; Americans sue at the drop of a hat; the courts are brimming over with frivolous lawsuits; courts are a first rather than a last resort; runaway juries make capricious awards to undeserving claimants; immense punitive damage awards are routine; litigation is undermining our ability to compete economically. Each of these is false, but in a complicated way; so let me address this structure of myth, starting with some of the more specific assertions and moving on to the sweeping generalities.

I. TOO MANY LAWYERS?

The first example is the assertion that the United States is home to seventy percent of the world's lawyers. Dropped casually by Vice President Quayle in his August 1991 speech to the American Bar Association (ABA), it was parroted by President Bush, Cabinet members, members of Congress and media experts, and became a familiar factoid in the rhetoric of the 1992 campaign.[1]

This is certainly an alarming figure. It suggests a monstrous deviation from the rest of the world and insinuates that lawyers are a kind of cancerous excrescence on American society. As someone who has studied lawyers comparatively, I wondered how this percentage was determined. Looking at the supporting Council on Competitiveness documents, I

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1. Vice President Dan Quayle, Address before the American Bar Association (transcript available in Federal News Service, Aug. 13, 1991). In addition, Vice President Quayle's acceptance speech highlighted the 70 percent figure. *Excerpts From Vice President Quayle's Address*, N.Y. TIMES, Aug. 21, 1992, at A15. Meanwhile the Republican Platform inexplicably reverted to the predecessor two thirds figure. *See infra* note 8 and accompanying text. Whether this item will outlive the political era that spawned it remains to be seen. In a post-election round-up for British readers, columnist George Will noted as one of "the nation's most pressing problems . . . the suffocation of economic and social energies by regulations, and by litigation from the 70 percent of the world's lawyers who are Americans." George F. Will, *Clinton: If He Succeeds, It Will Be Despite Himself*, THE DAILY TELEGRAPH (London), Nov. 12, 1992, at 17. More recently, television news host Barbara Walters solemnly reported that "70 percent of all the lawyers in the entire world are in this country." *Nightline*, Aug. 4, 1993, *available in* LEXIS, Nexis Library, ABCNEW file.

could find no sign of anything that could be called a calculation.[2] The seventy percent figure seems to be a retread of an item that surfaced a decade ago, having no apparent terrestrial origin, that the United States had two-thirds of the world's lawyers.[3] The two-thirds item was retailed by Chief Justice Burger as part of his indictment of litigious America.[4] It was subsequently used by Justice O'Connor and others,[5] and became part of the speeches of Governor Lamm of Colorado about America's descent to doom.[6] After the round-up to seventy percent in 1991,[7] the two-thirds figure dropped out of use, apart from a reappearance in the Republican Platform.[8]

Counting lawyers cross-nationally is a daunting undertaking, plagued by poor data and a bushel of apples and oranges problems.[9] However

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2. The President's Council on Competitiveness did not include the seventy-percent figure in its agenda [PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA, (1991) (hereinafter AGENDA)], but apparently there had been some consideration of it in the preparation of the Vice President's August 13 speech, for a week earlier "a Quayle spokesman" was reported as having "noted that the United States has 70 percent of the world's lawyers, and that the rising tide of litigation 'is a burden on our economy.'" Saundra Terry, *Quayle ABA Speaker*, WASH. POST, Aug. 12, 1991, at F5.

3. Among the earliest sightings were a newsmagazine report that "[t]he U.S. has 610,000 lawyers, two thirds of the world's total.... About 70 percent are in private practice." *Special Section: the ABCs of Justice*, U.S. NEWS AND WORLD REPORT, Nov. 1, 1982, at 55. [Could this be the origin of the seventy percent figure?] A few months earlier, James Spensley, a lecturer at the University of Denver Law School, was quoted as saying "The United States has become the world's most litigious society, employing over two thirds of the world's lawyers." David F. Salisbury, *Colorado's Quality of Life Fades in a Changing West*, CHRISTIAN SCI. MON., July 30, 1982, at 4. When I contacted Mr. Spensley on the telephone in January, 1992, he could not recall the source of this information.

4. Chief Justice Warren E. Burger, Annual Message on the Administration of Justice at the Midyear Meeting of the American Bar Association, February 12, 1984, at 2. "It has been reported that about two-thirds of all the lawyers in the world are in the United States and of those, one-third have come into practice in the past five years." *Id.* A very similar item appeared a few months earlier in a contribution to *Legal Times* by New York lawyer Peter Megargee Brown: "Two-thirds of all lawyers in the world are in the United States. One-third of the lawyers in this country have been in practice less than five years." *Profession Endangered by Rush to Business Ethic*, LEGAL TIMES, Sep. 23, 1983, at 10.

5. Milly McLean, *Sandra Day O'Connor: Some Advice for Young People*, U.P.I., April 10, 1984. *Cf.* Ernest Gellhorn, *Too Much Law, Too Many Lawyers, Not Enough Justice*, WALL ST. J., June 7, 1984, at 28 (a law school dean's op-ed reads "[t]wo-thirds of the world's lawyers now practice in this country, and one-third of these were graduated during the past five years.").

6. *E.g.*, John J. Sanko, *Governor Addresses Businessmen*, U.P.I., Nov. 3, 1983; Richard W. Larsen, *Time to Restore Logic to Public Policies*, SEATTLE TIMES, Oct. 14, 1990, at A18.

7. One failed bid for a yet higher portion was the attempt of a Reagan White House staffer who proclaimed that "familiar" statistics showed that "[t]he United States has more than 90 percent of the world's lawyers...." Mitchell E. Daniels, Jr., *The Young Must Lead In Repair and Reform*, NAT'L L.J., Aug. 18, 1986, at S-13.

8. *The Vision Shared: Uniting Our Family, Our Country, Our World: The Republican Platform 1992*, 75 (1992) [hereinafter *Republican Platform*]. A portent of renewed growth, combined with a daring cosmological speculation, appeared in a letter to the editor: "This country is home to 75% of all the lawyers in the universe. There are more of them in one building in Seattle than in all of Japan." Mark Gorney, WALL ST. J., Jan. 22, 1992, at A15.

9. The United States' "percentage of the world's lawyers" cannot be calculated meaningfully because legal professions in various countries are not exact counterparts of one another, but cousins more or less distant and bearing greater or lesser resemblance. *See infra* note 10 (noting the difficulties of counting lawyers). Given these differences, there is no single right answer to the "what percentage" question. Any answer must be based on some explicit or tacit notion of who is to be counted. For example, one might adopt a formal definition such as persons entitled to appear before the courts. But such a standard would

these are resolved, it is clear that the seventy percent figure is very far from the mark. An informed guess would be something less than half of that. Counting conservatively, American lawyers make up less than a third and probably somewhere in the range of one-quarter of the world's lawyers, using that term to refer to all those in jobs that American lawyers do (including judges, prosecutors, government lawyers and in-house corporate lawyers).[10]

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eliminate English solicitors as well as most of the various sorts of practitioners in Japan, much of whose work is similar to the work of American lawyers. We could, instead, adopt a functional definition. But those who are called lawyers perform many functions in some places and few functions elsewhere. In the light of the purpose at hand, it seemed appropriate to identify, as far as the sources permit, the counterparts of the broad, inclusive, multi-functional category of lawyer in the United States.

10. Although there are certainly deficiencies and gaps in the sources, it is possible to assemble enough data of reasonable credibility to establish that the United States had no more than thirty-five percent of the world's "lawyers" (defined in the inclusive American style) and possibly as low as twenty-five percent or a bit less if complete information were available. This is a rough calculation based upon an eclectic, common sense strategy of estimation, relying on a university library, on-line data services, and a network of acquaintances familiar with legal professions in various countries. The results are presented in Appendix I.

Professor Ray August arrives at a much lower figure (9.4%) by extrapolating from UNESCO figures on law student enrollments. *The Mythical Kingdom of Lawyers*, A.B.A. J. 72 (Sept. 1992). But the portion of law students who graduate and the portion of graduates who end up spending a lifetime providing legal services vary widely from country to country. To ascertain the number of "law providers" would require detailed assessment of the linkages in each country.

Professor August does not claim to have undertaken such an inquiry. Instead, he tells us, he "'massaged' the [UNESCO] data statistically to determine how many 'law providers'... there are in the world." The figures resulting from this process grossly overstate the "law provider" population in many countries where we have reasonably reliable counts. In Germany, for example, his figure is almost twice as high as David Clark's estimate, which is based on a count of all lawyers in private practice, notaries, judges, government lawyers, corporate lawyers, and law teachers. David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795, 1807-1808 (1988).

In many countries, the connection between law study and law practice is quite attenuated. For example, Professor August credits India (with whose legal system I have some familiarity) with the world's largest group of law providers, apparently over 800,000. This is more than three times the number of enrolled advocates in India. Law colleges in India are plentiful and large numbers of white collar workers and unemployed youths attend evenings or part time in order to obtain an additional credential. Many do not graduate. Of those who do, many do not enroll as advocates. Few engage in legal work for their employers. Of those enrolled advocates, an unknown but significant portion are eventually occupied otherwise than as providers of legal services. In other countries, too, the figures generated by Professor August's assumptions simply strain credibility. It takes considerable conceptual perseverance to conclude that Uruguay has more than six times as many law providers per capita as the United States. In this as in other cases, the totals appear to reflect the educational structures of particular countries more than their occupational structures. The rankings derived from these totals are, of course, vitiated by the same problems.

The myth that the United States has most of the world's lawyers is a baseless fiction promoted by people who should know better, many of whom probably do. By contrast, Professor August's estimate, arrived at systematically and conscientiously, does have a genuine informational base. But unfortunately it is so deeply flawed that in the end his conclusion that the United States has only nine percent of the world's lawyers, is no more worthy of belief than the Vice President's seventy percent.

Notwithstanding their infirmities, the August figures were brandished by beleaguered defenders of the civil justice system in the same credulous and uncritical way as the Quayle seventy percent figure was used by those attacking it. "You all play fast and loose with the facts. It's 9.8 percent." Bob Beckel, *Crossfire* (Cable News Network television broadcast, Aug. 27, 1992) (transcript #648). "In fact, the United Nations itself has a list of how many lawyers

Is that too many?[11] It is roughly the United States's proportion of the world's gross national product (GNP)[12] and less than our percentage of the world's expenditures on scientific research and development.[13] America is a highly legalized society that relies on law and courts to do many things that other industrial democracies do differently.[14] For a long time the United States has supported far higher numbers of lawyers per capita than nations with comparable economies. There is no reason to think American lawyers are less efficient than their counterparts elsewhere, although it appears they are called upon to do more than lawyers elsewhere. This is perhaps due to the dispersal of wealth, the fragmentation of authority, the absence of traditional elites or other reasons. In the past generation the number of lawyers increased dramatically from 285,933 in 1960 to 655,191 in 1985—an increase of 129%. But this recent growth is not a distinctly American phenomenon. The number of lawyers has been increasing everywhere—in many places at a faster rate than in the United States. For example, in the same period the number of lawyers increased by 147% in England and by 253% in Canada,[15] while the number of private practitioners in Germany increased by 156%.[16]

What is striking about the seventy percent figure is not that the esti-

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are in each country. The United States falls behind on per capita lawyers—behind Japan, behind Germany, behind France." Ralph Nader, *News Conference with Coalition of Consumer Groups*, FED. NEWS SERV., Sept. 2, 1992, at 4.

11. Even if we could count all the persons who go to work in the morning to provide legal services, we would need to know more than the number of workers to ascertain the portion of a nation's effort that is consumed in provision of legal services. And if we could measure that, we would come up against profound differences in the ways that "legal service" was defined in various countries and in the need or desire for law generated in different societies.

12. The United States' GNP for 1985 was $4,215.7 billion, or 30.3% of the world's total GNP for that year. WORLD TABLES 1992, 629.

13. The United States' expenditure on scientific research and development was $70 billion in 1980, or 56.9% of the $123.074 billion spent on scientific research and development worldwide. NATIONAL SCIENCE BOARD, SCIENCE AND ENGINEERING INDICATORS, Fig. O-1; GEORGE THOMAS KURIAN, THE NEW BOOK OF WORLD RANKINGS tbl. 299 (1984).

14. WERNER PFENNIGSTORF & DONALD G. GIFFORD, A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION SCHEMES IN TEN COUNTRIES AND THE UNITED STATES 129 (1991) (hereinafter PFENNIGSTORF & GIFFORD) (less frequent resort to tort system in other industrialized democracies is due to presence of public entitlement systems or to public and private insurance; these "alternative compensation sources do much of the work that is accomplished under the tort system in the United States." On the scantier coverage and lesser coordination of American social security schemes, see John M. Grana, *Disability Allowances for Long-Term Care in Western Europe and the United States*, 36 INT'L SOC. SEC. REV. 207 (1983); P.R. KAIM-CAUDLE, COMPARATIVE SOCIAL POLICY AND SOCIAL SECURITY (1973). *Cf.* ALFRED KAHN, SOCIAL SERVICES IN INTERNATIONAL PERSPECTIVE tbl. 2.2 (U.S. Dept. of Health, Educ. and Welfare, 1976).

15. Marc Galanter, *Law Abounding: Legalization Around the North Atlantic*, 55 MOD. L. REV. 1, 4 (1992) (detailing the figures and sources on England and Canada).

16. *See* Erhard Blankenburg & Ulrike Schultz, *German Advocates: A Highly Regulated Profession*, *in* 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 124, 150 (Richard L. Abel & Philip S.C. Lewis eds. 1988) (increase in number of advocates from 18,347 in 1960 to 46,927 in 1985).

The increase in lawyers is not confined to the wealthiest countries. For example, the number of lawyers in China multiplied many times over in the 1980s; from 1986 to 1990 it more than doubled from 22,147 to 47,461. Hao Pan, *Lawyers and Law Firms in Contemporary China—Toward a Framework of Interpretation*, 7 (May 28-31, 1992) (Paper presented at the 1992 Annual Meeting of the Law and Society Association, Philadelphia).

mate was so overblown, but that those who peddled it had reason to know it was a tall tale[17] and that neither Vice-President Quayle nor anyone else who thought it was a relevant fact deemed it important to make an informed, rather than a wild, guess.[18]

However, the United States' lawyer totals compare with those of others, we do have more lawyers and many lament this condition. The President's Council on Competitiveness deplored the "baleful effects" of having too many lawyers. The principal intellectual foundation for the view that lawyers hurt the economy is the work of University of Texas finance professor Stephen Magee. Magee has tried to show that the countries with the highest lawyer populations[19] suffer from impaired economic growth. Magee's conclusion is wrong. His first version was shown to be false[20] and his latest version is no stronger. The best research on the topic reaches entirely different conclusions.[21]

In Magee's first take on this issue, he claimed that all lawyers are economically destructive. Apart from being silly on its face, that conclusion resulted from an empirical analysis containing major methodological errors. His analysis compared the lawyer populations and economic growth rates of 34 countries, and concluded that the more lawyers a country has, the lower is its rate of growth.[22] That analysis is shot through with problems. First, Magee relied on poor lawyer data—his lawyer figures for several countries were substantially incorrect. Second, he employed a peculiar research design that used lawyer data in 1983 to predict economic growth from 1960 to 1985—even though his own figures showed that the number of lawyers in 1983 bore little relation to the number in 1960. Third, Magee's research did not take into account ("control for") any

17. The drafters of the Council's AGENDA had reason to know that seventy percent was a falsehood. On page 1 of the AGENDA, there is an approving reference to, but no citation for, "a recent report by a Professor of Finance at the University of Texas . . . estimated that the average lawyer takes $1 million a year from the country's output of goods and services." What the report referred to is Chapter 8 of Stephen P. Magee et al., BLACK HOLE TARIFFS AND ENDOGENOUS POLICY THEORY: POLITICAL ECONOMY IN GENERAL EQUILIBRIUM (1989). That source contains an incomplete listing of the number of lawyers in some 34 countries as of 1983. Even this inadequate enumeration showed American lawyers as just forty-five percent of the total. One can conclude that the Council staff either did not examine the source they approvingly cite or that they were aware that there was good reason to believe the seventy percent figure was spurious.

18. Just a few weeks before he repeated the seventy percent figure in his speech accepting the vice presidential nomination, Vice-President Quayle brushed off criticism of its accuracy with the *ad hominem* observation "Only those who benefit from the squandering of litigation resources are attempting to calculate to the decimal the total costs of all lawsuits or to determine whether Japan's scriveners should be counted in a census of the world's lawyers." Dan Quayle, *Too Much Litigation: True Last Year, True Now,* NAT'L L.J. 17 (Aug. 10, 1992).

19. In Magee's research, the lawyer population is measured as a ratio to either doctors or white collar workers, which are both taken to reflect the size of the productive work force of a society.

20. Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System,* 70 TEX. L. REV. 645 (1992).

21. Charles R. Epp, *Do Lawyers Impair Economic Growth?,* 17 LAW & SOC. INQUIRY 585 (1992); Cross, *supra* note 20.

22. STEPHEN P. MAGEE ET AL., *supra* note 17.

other known influences on economic growth, including such powerful influences as a country's level of political instability. Finally, the conclusion resulted in large part from the coincidence of low economic growth rates and high lawyer populations in two "outliers" (Argentina and Nepal), whose legal systems and economies bear little relation to our own.

After critics pointed out those failings, Magee refurbished his research, and now claims that only lawyers above a certain optimal number hurt an economy.[23] Stated that simply, the view has an intuitive plausibility: surely if all Americans were lawyers and did nothing else, our economy would have problems. Magee's leap to the conclusion that there are, in fact, too many lawyers in the United States is a different matter.

Like his first version, Magee's latest research is deeply flawed and probably would not merit discussion were it not receiving so much publicity. In attempting to determine the economic effect of lawyers, he now takes into account known influences on economic growth. But his conclusions still depend primarily on 1983 lawyer data for predicting prior economic growth, and they still rest on flawed lawyer data. For example, he estimates that there are 43,100 lawyers in West Germany; but if we include not only lawyers in private practice but also government lawyers, corporate lawyers, judges and law teachers—all included in the United States lawyer count—the total number of German lawyers in 1985 would have been 115,900.[24] That produces a lawyer-to-white collar worker ratio of 29 per thousand, not the 11 per thousand that Professor Magee asserts. Inaccuracies of that magnitude are not minor details. In his most recent response to these criticisms, he declares that lawyer data corrected for such errors still support his conclusion.[25] This is true, however, only if the lawyer data are used to "predict" prior economic growth, an unjustifiable research strategy. The same data contradict Magee's results when they are employed in analysis of subsequent economic growth.[26] In addition, Magee's latest conclusion, like his earlier one, rests on the coincidence of slow growth and high lawyer populations in a few idiosyncratic countries, now Uruguay and Chile.

As a corollary, Magee claims that lawyers have captured the United States' political system, evidenced by the fact that forty-two percent of United States Representatives and sixty-one percent of Senators are law-

23. According to Magee's calculations, the optimal number in 1983 was 23 lawyers per 1,000 white collar workers; the United States had about 38/1,000 in that year. Stephen Magee, Letter to the Editor, WALL ST. J., Sept. 24, 1992, at A17.

24. Clark, *supra* note 10, at table 1.

25. Stephen P. Magee, *The Optimum Number of Lawyers: A Reply to Epp*, 17 LAW & SOC. INQUIRY 667 (1992). In that article, Magee also presents statistical results using lawyer data for a number of countries from 1975. Epp shows that those results are very tenuous, depending on one outlier (the United States); if that outlier is removed from the sample of countries, Magee's discovered relationship between lawyers and growth disappears—yet one country cannot justifiably be used as the basis for statistical conclusions. Epp also shows that Magee's 1975 lawyer data are largely Magee's own creation, and are "no better than a guess." *See* Epp, *supra* note 21.

26. Epp, *supra* note 21; Charles R. Epp, *Toward Future Research on Lawyers and Economic Growth*, 17 LAW & SOC. INQUIRY 695 (1992).

yers. This hardly means, however, that the legal profession has captured the political system: those lawyers in Congress are Democrats and Republicans, liberals and conservatives, proponents of regulation and enemies of regulation. As a bloc, they share no discernible interest; a range of studies finds no difference between the voting patterns of lawyer-legislators and those of nonlawyer-legislators.[27]

Careful analyses of the effect of lawyers on the economy find no support for the Magee hypothesis; indeed, they find that lawyers have no significant effect at all on overall economic growth.[28] The Magee analysis rests on many of the familiar but unproven contentions about the civil justice system. He assumes that the presence of "excess" lawyers is evidenced by the presence of "predatory" litigation, as distinguished from justified or beneficial litigation. But he provides no evidence of the frequency of bad litigation independent of the conclusion that there are too many lawyers.

II. The Cost of the Legal System

Another count in the indictment of the civil justice system is its excessive cost. Vice-President Quayle reported that "the legal system . . . now costs Americans an estimated $300 billion a year . . . ."[29] This figure seems to derive from the *Agenda for Civil Justice Reform* of the President's Council on Competitiveness, which starts its accounting of litigation costs by stating:

> A recent article in *Forbes* estimates that individuals, business and governments spend more than $80 billion a year on direct litigation costs and higher insurance premiums and a total of up to $300 billion indirectly, including the cost of efforts to avoid liability.[30]

Forbes didn't actually conduct any analysis of its own: the authors of a story on plaintiffs' lawyers cited publicist Peter Huber who, they recounted:

> focused attention on the total 'tort tax' on the economy. Huber estimates that individuals, businesses and governments pay at least $80 billion a year directly, in such ways as litigation costs and higher insurance premiums, and a total of $300 billion indirectly, counting the cost of efforts to avoid liability.[31]

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27. *See* Epp, *supra* note 21. The explanations for why we have so many lawyer-legislators in the United States have little to do with lawyers' ostensible interest in "capture;" rather, lawyers enter politics to a greater degree in the U.S. than elsewhere because in this country political involvement helps lawyers' careers and because the structure of our party system does not exclude entrepreneurial politicians (like lawyers) as do party systems in many other countries. *See id.* for a survey of the research on lawyers in legislatures.

28. Epp, *supra* note 21; Cross, *supra* note 20.

29. Remarks by Vice-President Quayle at the American Business Conference, Oct. 1, 1991, Fed. News Serv. The same figure reappears in the *Fact Sheet, Access to Justice Act, 1992*, Office of the Press Secretary (Feb. 4, 1992).

30. Agenda, *supra* note 2, at 1.

31. Peter Brimelow & Leslie Spencer, *The Plaintiff Attorneys' Great Honey Rush*, Forbes, Oct. 16, 1989. An earlier *Forbes* story had cited the eighty billion figure as including indirect as well as direct costs. The president of the Defense Research Institute was reported as noting that

Huber proffered these figures in his 1988 book in the course of equating tort liability with a

> tax [that] directly costs American individuals, businesses, municipalities and other government bodies at least $80 billion a year, a figure that equals the total profits of the country's top 200 corporations. But many of the tax's costs are indirect and unmeasurable. . . . The extent of these indirect costs can only be guessed at. One study concluded that doctors spend $3.50 in efforts to avoid additional charges for each $1 of direct tax they pay. If similar multipliers operate in other areas, the tax's hidden impact on the way we live and do business may amount to a three hundred billion dollar annual levy on the American economy.[32]

Huber's eighty billion figure is considerably higher than several systematic estimates of tort costs published in the years preceding the appearance of his book.[33] (These in turn have been often misrepresented by partisans

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> experts estimate that the total costs associated with tort liability exceed $80 billion annually. These costs include not only lawyers' fees, court costs and damage awards but also the much greater amount of money that corporations and individuals invest in efforts to avoid being dragged into court in the first place.

Ronald Bailey, *Mr. Tort Reform*, FORBES, Dec. 12, 1988, at 276.

32. PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 4 (1988).

33. For the most prominent of these, see JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION (1986). The authors conclude that total expenditures for all tort litigation terminated in 1985 was between $29 and $36 billion, including "compensation paid to plaintiffs, legal fees and related expenses for both plaintiffs and defendants, insurance company claims-processing costs for claims in suit, the value of litigants' time spent, and the costs of operating the court system for these cases." *Id.* at vi-vii. It should be noted that this estimate includes only claims in which suit was filed in a court of general jurisdiction. The authors estimate compensation paid in tort claims in courts of limited jurisdiction was $1.8 billion, not counting legal fees and expenses. They report that "[c]ompensation paid on liability claims that did not involve lawsuits was an estimated $22 billion in 1985." *Id.* at 66.

Another study estimates the amount paid to claimants by the tort system (which would include most of plaintiffs' costs, but not those of defendants or courts) in 1984 at $39 billion, plus non-automobile self-insurance costs which were not calculated. Since it includes all payments, not just those in lawsuits in courts of general jurisdiction, the addition of the missing costs would bring this in the vicinity of the ICJ figures. Jeffrey O'Connell & James Guinivan, *An Irrational Combination: The Relative Expansion of Liability Insurance and Contraction of Loss Insurance*, 49 OHIO ST. L. J. 757, 759 (1988). This may have appeared too late to have come to Huber's attention before the publication of his 1988 book. A year earlier, the senior author of this study published a comparable estimate of tort system payouts of $31.3 billion for 1982. Jeffrey O'Connell & Jay Barker, *Compensation for Injury & Illness: An Update of the Conard-Morgan Tabulations*, 47 OHIO ST. L. J. 913, 921 (1986).

A contemporaneous study by two New York University economists estimated that the administrative costs of the tort system in 1984 were somewhere between $15 and $20 billion, very close to Kakalik and Pace's estimate of $16 to $19 billion. ANDREW SCHOTTER & JANUSZ ORDOVER, THE COST OF THE TORT SYSTEM (1986).

A study of tort costs by a leading actuarial consulting firm, commissioned by the American Insurance Association, estimated the costs of the system in 1984 as $66.5 billion. ROBERT W. STURGIS, THE COST OF THE U.S. TORT SYSTEM 22 (1985) (Updated and expanded versions of this compilation were issued by Tillinghast with no author listed. *See infra* note 42.)

In response to critical assessment of his research practices, Huber has disavowed the Malott quote as the source of the $80 billion figure, contending that when researching *Liability* in 1987 he "had before [him]" two articles from the *Wall Street Journal*, one from the *Economist*, one from *Forbes*, all dated 1986, and the Scotter-Ordover study. Peter Huber, *Huber Responds*, Letter to the Editor, TEXAS LAW., Feb. 8, 1993, at 2. One of these *Wall Street Journal*

eager to minimize the costs of the system.)[34]

Huber does not report any investigation or analysis of his own. Instead, he cites two sources. For the eighty billion direct cost figure he gives a citation to *Chief Executive* magazine that turns out to be a round table discussion among executives. In the course of that discussion, Robert Malott, chairman and CEO of FMC, and a prominent Republican fundraiser and the Business Roundtable's "point man on product liability,"[35] devoted a single sentence to the magnitude of liability costs:

> It's estimated that insurance liability costs industry about $80 billion a year, roughly the equivalent of the profitability of the top 200 corporations in the U.S. The number of liability lawsuits has risen over 10 years by 600 percent.[36]

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articles (Stephen Wermiel, *The Costs of Lawsuits, Growing Ever Larger, Disrupt the Economy*, WALL ST. J., May 16, 1986, p. 1, col. 6) and the *Forbes* article (*Just The Facts, Please*, FORBES, Oct. 27, 1986, at 10) cite the Sturgis [Tillinghast] study's figure of $66.5 billion as the cost of liability insurance in 1984. The other two (David B. Hilder, *Insurers' Push to Limit Civil Damage Awards Begins to Slow Down*, WALL ST. J., August 1, 1986, p. 1, col. 6; *The guilty parties in the great liability insurance crisis*, THE ECONOMIST, Mar. 22, 1986, at 23) refer to $70 billion as the previous year's cost of resolving liability claims (possibly a very different number). Although these numbers seem to derive from the Sturgis figure, there is no specification of a source or indication of what is included.

Anti-litigation publicist Walter Olson, in defense of Huber, insists that "[t]he $80 billion figure . . . came from the widely publicized Tillinghast/Towers Perrin studies" which he attests "had been widely if not universally reported in the press . . . ." Walter Olson, *Defending Huber*, Letter to the Editor, TEXAS LAW., Feb. 8, 1993, at 2. As indicated in note 42 *infra*, there never was a Tillinghast $80 billion dollar figure.

Whatever was "before" Huber at the time, there is no indication in his book that he examined any of the then extant sources: Kakalik and Pace, Sturgis [Tillinghast], O'Connell and Barker, Schotter and Ordover. The last word is likely to remain Huber's observation that "[a]ny half-competent student of tort liability in 1987 knew that liability insurance costs were then running somewhere in the $80 billion range." Huber, *supra*, at 2. Huber's citation practices are addressed at length in Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637 (1993).

34. Typically this is done by presenting the Rand estimate for the cost of litigated cases as the cost of the whole system. Tom Gibbins, *Propositions Built on Myth*, NAT'L L. J. 17-18 (Oct. 7, 1991); Jamie S. Gorelick, *A Profession under Attack from Without and Within*, WASH. LAW. 6 (Sep.-Oct., 1992); Mark Green, *Bush and Quayle's 'Legal Reform:' A Hoax*, NEWSDAY, Oct. 14, 1992, at 87.

35. Paul Merrion, *Fresh Faces Animate GOP Fund-Raising*, CRAIN'S CHI. BUS., Aug. 15, 1988 (fund-raising); John S. McClenahen, *Whatever Happened to The Corporate Statesman?* INDUS. WK., Nov. 6, 1989, at 55 ("point man").

36. *How Do You Cope When Coverage is Unaffordable or Unavailable*, CHIEF EXECUTIVE (Summer 1986). No source or basis for this "estimate" is provided. From the context, it is unclear whether Mr. Malott is presenting this as the cost of product liability or of the entire tort system. The reference to a 600% increase of "liability lawsuits," echoing then-prevalent alarm about the rising number of product liability cases filed in the federal courts, suggests that it was product liability that he had in mind, not all tort cases.

Whatever its source, the figure must have come to Mr. Malott's attention not long before the round table, for the published version of a talk delivered Oct. 10, 1985, at Northwestern University Law School's Corporate Counsel Institute on "America's Liability Explosion: Can We Afford the Cost?" contains no estimate of overall costs.

One possible source of Mr. Malott's figure is the estimate of tort system costs in an address by Robert W. Sturgis of Tillinghast, Nelson and Warren, a leading actuarial consulting firm, to the Annual Meeting of the American Insurance Association in Chicago (Nov. 14, 1985). Reporting the results of a study commissioned by the Association, Mr. Sturgis estimated the costs of the tort system in 1984 at 66.5 billion. ROBERT W. STURGIS, THE COST OF THE U.S. TORT SYSTEM 22 (1985). "Eighty billion" might represent a bit of rounding up for

The eighty billion figure has enjoyed continuing use, often linked with the nugget, which Huber takes from Malott, about the profits of the two hundred largest corporations. It appears prominently in a long-running advertisement by the American International Group insurance companies, entitled "Why reforming our liability system is essential if America is to succeed in overseas markets."[37] Some temporal elaboration is offered by Susan Engeleiter, then Administrator of the Small Business Administration, in a 1990 op-ed piece that reports "[e]xperts estimate that the total cost of product liability lawsuits between 1973 and 1988 was $80 billion each year—a sum equal to the combined profits of the 200 largest corporations in the United States."[38] In this branch of the eighty billion tradition, it is put forward as the cost of product liability, while Huber takes that amount as the cost of the entire tort system.

For the move from eighty to three hundred billion, Huber multiplies eighty billion by three and half — and rounds up. The three and half multiplier is taken from an editorial in the *Journal of the American Medical Association* that refers to a study of practice changes attributed to malpractice by physicians surveyed in 1984.[39] Thus Huber's "estimate" consists of multiplying the undocumented surmise of Mr. Malott by the ratio of physician-reported changes to malpractice insurance premiums. There is no discussion of the representativeness of this species of liability, of this segment of time, or of the suitability of this measure.[40]

Even though Malott (and following him, AIG and Engeleiter) appears

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growth during the intervening year and a half. But it is clear that the Sturgis figure is for the entire tort system, not just product liability.

37. The earliest of these in my possession is from the N.Y. TIMES, Feb. 25, 1990 ("... it has been estimated that this hidden [liability] tax amounts to $80 billion a year—a sum equal to the combined profits of the nation's 200 largest corporations.") The same text is found in a version that appeared in THE NEW YORKER, Feb. 10, 1992, at 54-55. An earlier AIG advertisement approvingly cites Huber's book, suggesting the possibility that the $80 billion figure may have been borrowed from that source. *The Liability Lottery: We All Lose*, WALL ST. J., Apr. 13, 1989, at A12-A13.

38. *Product Liability Laws: The Economy is the Victim, Says Small Business Administration's Engeleiter*, PR NEWSWIRE, Dateline: Washington, July 24, 1990, *in* WASH. TIMES, Aug. 3, 1990, at F3; METALWORKING NEWS, Aug. 13, 1990, at 15. So far no reformer has seized the opportunity offered by Ms. Engeleiter to escalate the costs of product liability alone over the trillion mark (16 years × 80 billion = 1.28 trillion).

39. Jeffrey E. Harris, *Defensive Medicine: It Costs, but Does it Work*, 257 JAMA 2801 (1987). The editorial refers to a study that finds that physicians who reported an average increase of $1300 to $8400 in the cost of their malpractice insurance also "reported changes in their medical practices that were worth an additional $4600 per physician per year." From this finding the authors of the study calculated that "each $1 of malpractice risk—as gauged by insurance premiums—induces $3.50 in defensive medicine expenditures." *Id.*; *see* Roger A. Reynolds *et al*, *The Cost of Medical Professional Liability*, 257 JAMA 2776 (1987).

40. For some of the implausible assumptions built into Huber's unexplained multiplier move, see Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 STAN. L. REV. 539, 549-50 (1990). When the President of the American Bar Association cited the Hager article, Huber berated him for relying "on an obscure 1990 law review piece that extols the virtues of health care in Cuba, quotes Karl Marx with grave respect, and, oh yes, heatedly attacks my book." Peter Huber, *Dan Quayle, the Lawyers and the AIDS Babies*, FORBES, Oct. 28, 1991, at 194. The relevance of Huber's response may be judged by noting that the reference to the achievement of high life expectancies in Cuba takes up nine lines in a forty-one page review. The respectful quotation of Marx consists of two lines containing the famous aphorism that history repeats itself, the first time as tragedy, the second as farce.

to have addressed the costs of *product liability*, Huber adopted his figure as an estimate of the direct cost of *all tort* litigation. When the estimate, if that is the term, was adopted by the *Forbes* writers it was as the cost of all torts. The Council on Competitiveness and Vice-President Quayle, who purported to address the entire civil justice system, present these borrowed figures as the cost of *all civil litigation* to the United States economy. Finally the Republican Platform adopted "$300 billion a year" as the cost of "our legal system."[41] Proponents of these wider usages never indicate whether they scaled down Huber's tort estimate (or Malott's product liability estimate) to make room for the costs of the far more numerous non-tort cases and many non-litigation parts of the legal system or whether they concluded that non-tort litigation and non-litigation is costless. Indeed, the Vice-President and the White House compressed Huber's eighty billion of direct costs and three hundred billion of indirect costs for torts alone into a total cost of three hundred billion for the whole legal system.[42]

In the heat of the 1992 presidential campaign, a year after Vice-President Quayle's address to the ABA, a new cost figure was projected into the national debate. In the midst of a discussion of "our crazy, out of control legal system" that focussed on mounting and burdensome litigation, President Bush referred to a new study by the National Association of Manufacturers, reporting that "American consumers and companies will spend up

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41. *Republican Platform*, *supra* note 8, at 76.

42. *See supra* note 1 and accompanying text. Huber was proud to acknowledge paternity of the Vice President's $80 billion dollar figure. A few months after Quayle's speech, he wrote that the "spat" between Vice-President Quayle and ABA President D'Alemberte about tort costs "apparently derives from a number noted briefly in my 1988 book *Liability*." Peter Huber, *Dan Quayle, the Lawyers and the AIDS Babies*, FORBES, Oct. 28, 1991, at 194. But a subsequent *Forbes* article, by one of the authors of the 1989 article that cited him, announced a revised genealogy for its $80 billion figure that omits Huber. Now "[t]hat figure was based on a study by Tillinghast, a Hartford-based actuarial consulting company." Leslie Spencer, *The Tort Tax*, FORBES, Feb. 17, 1992, at 40. Spencer notes that this figure "represented lawyers' fees, payouts to claimants and insurers' administrative costs in 1985." But the 1989 article never referred to Tillinghast and specifically credited the figure to Huber, who makes no mention of Tillinghast in the references to his book. An earlier *Forbes* story had noted the Tillinghast estimate, which it gave as $68 billion, for 1984. *Just the Facts, Please*, FORBES, Oct. 27, 1986, at 10. The $80 billion figure, however, does not correspond closely to any annual figure published by Tillinghast. *See* Sturgis, *supra* note 33, at 22. Tillinghast estimates for the cost of the tort system are:

1984	$66.3 billion
1985	$89.2
1986	$108.4
1987	$117.0

Tillighast, *Tort Cost Trends: An International Perspective 1989*, at A4. These were the most up-to-date figures published by Tillinghast prior to the release in October, 1992 of its further update, entitled *Tort Cost Trends: An International Perspective 1992* [hereinafter *Tillinghast 1992*]. That publication revised and extended the earlier estimates as follows:

1984	$66.0 billion
1985	$87.2
1986	$105.2
1987	$112.4
1988	$115.5
1989	$122.9
1990	$130.5
1991	$132.2

to 200 billion dollars on legal services this year—200 billion dollars." This figure was introduced as revealing "what this litigation explosion costs our economy."[43]

Two hundred billion as the cost of litigating lawyers would presumably escalate total direct costs far beyond the eighty billion or even the three hundred billion that figured in earlier estimates. The Presidential conflation of lawyer costs with litigation costs is understandable since the NAM report is misleadingly entitled *The Cost of Litigation.*[44] The report is based on Department of Commerce data on expenditures on lawyers' services. Most of the direct cost of litigation is the cost of lawyers, but it does not follow that most of the spending on lawyers is for litigation.[45] No one knows just what portion of these expenditures on legal services are connected with litigation.[46] It is surely less than all and probably far less than most. In any event, the NAM document makes no attempt to distinguish litigation costs from other legal costs. Even as an estimate of total legal services costs for 1992, the NAM's $200 billion figure is deeply problematic. Its largest component is a rather precarious projection from the Department of Commerce's 1982 and 1987 figures;[47] and those figures seem to have been misread.[48]

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43. President George Bush, remarks at a Labor Day Picnic in Waukesha, Wisconsin (Sept. 7, 1992) FED. NEWS SERV. [hereinafter Labor Day].

44. NATIONAL ASSOCIATION OF MANUFACTURERS, THE COST OF LITIGATION: A NEW PERSPECTIVE WITH SELECT BIBLIOGRAPHY, (1992) [hereinafter NAM].

45. See the Civil Litigation Research Project's study of "ordinary" litigation, "[f]ees paid to lawyers (including expenses charged) make up 99% of the out-of-pocket costs in the median case for individual clients, and 98% in the median case for organizations." DAVID M. TRUBEK ET AL., CIVIL LITIGATION RESEARCH PROJECT FINAL REPORT Pt. A, II-9.

46. Some legal costs are not included in these Department of Commerce figures such as the cost of in-house counsel, some of whose expertise is attributable to litigation.

47. Based on Department of Commerce's *Benchmark Input-Output Accounts of the United States,* the NAM estimates that in 1992, consumers will spend $53.4 billion legal services and that business will spend an additional $148.1 billion, for a grand total of $201.5 billion. *See* NAM, *supra* note 44, at 8-12.

The estimate of business spending is a projection from 1982 and 1987 figures. It is based on the assumption that business spending increased at the same rate in 1987-92 as in the previous five year period. This is problematic, for consumer spending, which business spending closely tracked in the first period, increased at a much lower rate over the second period. (We know this because the consumer expenditures are reported annually, while the business expenditures are reported only at five year intervals.) For this reason, NAM provided a second estimate of business expenditures of $110 billion, based on the known rate of increase of consumer spending over the second period, which would reduce the total to $163.4 billion for 1992.

48. Even NAM's revised estimate is suspect because it appears that in reading the tables on expenditures for 1982 and (possibly) 1987, NAM inflated the total of business expenditures by double-counting personal expenditures. NAM, *supra* note 44. In 1982 the Department of Commerce's Table 3 (The Use Table for Commodities), which lists the value of commodities and the industries that use them, reports the *total* value of commodity 73.0301 [legal services] as $39.421 billion. U.S. DEPARTMENT OF COMMERCE, THE 1982 BENCHMARK INPUT-OUTPUT ACCOUNTS OF THE UNITED STATES tbl. 3, 180 (1991) [hereinafter BENCHMARK]. This total is then broken down, "using industry" by "using industry." Among the list of users is 91.0000 [personal consumption], which is listed as using legal services valued at $18.3706 billion. *Id.* at 181. This corresponds to the $18.4 billion reported by NAM as *Personal Consumption Spending for Legal Services* in 1982. *NAM, supra* note 44, at tbl. 1. NAM reports *business* expenditures on legal services for 1982 of $38.3 billion, although according to the Benchmark table, the *total* value of legal services in that year was $39.4 billion. *See id.*, at 12. Appar-

Quite apart from their origin in conjecture and the vacillation about just what is being measured, most "cost of litigation" figures have two deeper and more significant flaws. First, they conflate costs and transfers. A significant portion of the wealth that flows through the litigation system is compensation delivered to creditors and wronged parties to which they are entitled under the going rules.[49] This half (or more) of the supposed cost is a cost to defendants, but it is not a cost of the system or a cost to the country, for the wealth is not lost but only transferred to different hands. That it costs so much to effectuate these rightful transfers is a scandal—but controlling these transaction costs should not be confounded with reducing the rights of claimants. Second, they talk about costs in isolation from benefits.[50] Our accounts should reflect not only the costs but the benefits of enforcing such transfers, which afford vindication, induce investments in safety, and deter undesirable behavior. For instance, the sums transferred by successful patent infringement litigation are not only not lost, but maintain the credibility of the patent system which in turn creates powerful incentives. To put forward estimates of gross costs—even ones that are not make-believe—as a guide to policy displays indifference to the vital functions that the law performs. America's institutions of remedy and accountability and the lawyers that staff them are portrayed as burdensome afflictions. They are viewed as costs and thus as deadweight losses.

In connection with this second point, it should be noted that the costs

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ently in arriving at its estimate of business expenditures, NAM omitted to remove personal consumption expenditures from the total, thus greatly overestimating business expenditures in that year.

Once this is corrected, the otherwise anomalous NAM totals accord roughly with published Census data on the receipts of the legal services industry, which listed total receipts in 1982 of $34.325 billion, of which $15.270 billion was received from individuals and $16.699 billion was received from businesses. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, CENSUS OF SERVICE INDUSTRIES: LEGAL SERVICES, 1982 Table 30.

I am not in a position to perform a similar analysis of the 1987 data since these are not yet published. NAM reports that it relied upon preliminary estimates obtained from the Commerce Department. *See* NAM, *supra* note 44, at 11-12.

If we reduce the totals to eliminate the double-counting, business expenditure on legal services in 1992 would be some $62 billion rather than the $110 billion projected by the NAM (on the assumption that growth tracked the growth of consumer expenditures) and the total expenditure on legal services would be $115 billion instead of $163 billion.

49. The Institute for Civil Justice estimated that the net compensation to plaintiffs in tort cases in 1985 was roughly half of the dollars spent on tort litigation. But the portion received by plaintiffs varied with the type of litigation: it was fifty-two percent in automobile torts, forty-three percent in non-automobile torts, and only thirty-seven percent in asbestos cases. DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 29 (1987). I know of no data about the ratio of recoveries to total expenditures in non-tort litigation.

50. Thus, Huber labels the gross cost of the tort system a "tax" and implies that it is a deadweight loss. In contrast, both the Harris editorial and the original Reynolds study (the sources of his indirect cost estimate) acknowledge that there are medical benefits or deterrence effects of these additional expenditures that remain unmeasured. Similarly, Robert Sturgis, the source of the Tillinghast estimates of tort costs, reminds his audience that "we have settled upon a definition of gross cost without regard for the social and economic benefits that may be derived from the system." Robert W. Sturgis, Address before the American Insurance Association (Nov. 14, 1985).

attributable to present institutional arrangements are made to loom menacingly large by ignoring the costs of alternative arrangements for obtaining equivalent benefits. For example, if we were to forego the tort system's contribution to accident prevention, presumably people and businesses would make other expenditures to prevent and minimize injury. The savings from completely abolishing the tort system would not be all the billions that flow through it—nor even all the billions spent on it, but only that increment beyond what would be spent on the alternative means of protection. So a genuine assessment of the legal system would have to consider not only its costs, but the benefits it produces and the cost of producing such benefits by alternative means.[51]

Sadly, the discourse about the cost of litigation is as flawed as the discourse about the abundance of lawyers. Each is marked by an utterly cavalier treatment of facts, a use of sources that would shame any first year law student, and an absence of any serious attempt to make a disciplined assessment of what is going on in the world.

III. THE COMPETITIVENESS CHARGE

Many nasty effects have been attributed to lawyers and litigation. Earlier critiques of the civil justice system focussed on the erosion of community, the decline of self-reliance, the atrophy of informal self-regulatory mechanisms, and the fostering of a corrosive adversary culture.[52] In the latest round, these have been eclipsed by concern that the civil justice system is undermining the country's economic performance. The Vice-President's engagement with civil justice emerged from his leadership of the President's Council on Competitiveness. Although that Council's *Agenda* and its polemical progeny spoke of litigation in broad terms, it is product liability litigation that is the essence and model of the problem. As President Bush recently put it, "[o]ur product liability system is killing our economic competitiveness . . . ."[53] Escalating product liability litigation is blamed for undermining competitiveness by raising costs, diverting investment, and discouraging innovation. That product liability litigation is increasing inexorably, driven by the greed of entrepreneurial lawyers, the wrongheadedness of activist judges, and the rising litigiousness of ordinary Americans is a key count in the indictment of America's civil justice system.

Figure One displays the number of personal injury product liability filings each year from 1985 to 1991 (the last year for which published information is available.)[54] The total is broken down into asbestos cases and

51. Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23 (1990) (comparative institutional analysis); *cf.* Peter L. Kahn, *Pricing the U.S. Legal System*, CHRISTIAN SCI. MON., Sept. 11, 1992, at 19.

52. For a catalog of these charges, see Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

53. *See* Labor Day, *supra* note 43.

54. All years referred to are Statistical years used by the Administrative Office of the

all other product liability cases. Figure One presents a massive surge in asbestos filings accounting for all of the increase in filings in the product liability category. Indeed, if we look at the remainder, which includes cases involving every other product save this one, we find that the total of non-asbestos products liability filings has shrunk from 8268 in 1985 to 5263 in 1991—a decrease of thirty-six percent.

Is it legitimate to "put aside" asbestos cases? Asbestos litigation is a painful problem that displays much of the worst about our system of litigation—high costs, repetitive litigation, severe delays, and inconsistent awards. Asbestos litigation presents a problem of assuring justice to victims (and to their injurers). It also presents a problem of congestion in many courts. But each of these—the justice problem and the congestion problem—is quite distinct from the supposed problem of excessive product liability litigation debilitating the American economy.

Asbestos cases are a distinctive population of cases. For the most part, these cases deal with events that happened decades ago. They are typically complicated by the presence of multiple defendants—about twenty in the typical case. They arose from the use of a product of unparalleled deadliness, to which there was massive exposure that continued long after the dangers of its use were suspected. As a report from the Federal Judicial Center put it:

> During a period of increasing use, asbestos manufacturers suppressed knowledge about the dangers of exposure to asbestos fibers. The result was a further accumulation of potential cases and a factual foundation for punitive damages. A by-product of suppression of unfavorable information was that companies failed to improve safety standards and communicate warnings that might have mitigated the dangers . . . ."[55]

The report concludes that the convergence of these factors made asbestos litigation unique with "no historic analogues and no projected recurrence of similar phenomena."[56] Eventually, there will be no more asbestos cases, as the pool of victims is depleted. This is due first to the deadly effects of asbestos, and secondly to the powerful preventive effects produced by the asbestos litigation. No one can say that we cannot have another such epidemic about another product. But if we did it too would be distinct from the pattern of ordinary product liability litigation. It would have no effect on the fortunes of the companies that make the tens of thousands of other products.

If we turn to those other companies, it would appear that they have experienced a significant decrease in their exposure to product liability cases.[57] It is possible, of course, that product liability claims increased

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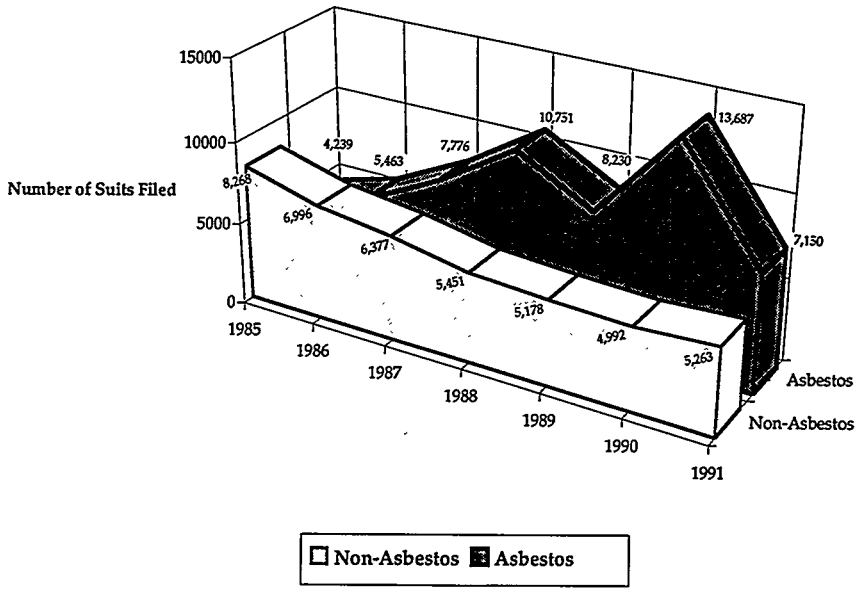
Courts, ending on June 30th of the named year. The choice of 1985 is dictated by the fact that it was the first full year in which asbestos cases were counted separately from other product liability cases.

55. THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, TRENDS IN ASBESTOS LITIGATION xi (1987).

56. *Id.* at xii.

57. Of course, such exposure is not spread evenly across all companies. Product liability

Product Liability Filings, Asbestos and Non-Asbestos
Federal District Courts 1985-1991



Source: Administrative Office of the U.S. Courts, Annual Reports

even while case filings decreased—because more claims are paid without the filing of a lawsuit or because larger numbers of claims are combined into single filings. But those who point to the burden of product liability law have provided no evidence that either of these eventualities has occurred.[58] It might be objected that our figures are only for filing in federal courts. It is well known that the vast majority of civil cases are brought in state courts. The federal court data is not necessarily representative of trends in the state courts, where the great bulk of cases are brought.

No one knows the total amount of product liability litigation in the state courts. Only a handful of states count these cases separately on a regular basis. There is some scattered evidence, however, from which we can derive a rough sense of the presence of product liability claims in the state courts. We do know that product liability is much less prominent in state court dockets than in the federal courts. Several studies suggest that

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cases are highly concentrated in a small number of industries. An Institute of Civil Justice study identified the first named defendant in all of the product cases filed in federal court from 1974 to 1986. Eighty companies were the defendants in half of those cases: the defendants in the other half were some nineteen thousand companies. T. DUNWORTH, PRODUCT LIABILITY AND THE BUSINESS SECTOR: LITIGATION TRENDS IN FEDERAL COURT 25 (1988). Dunworth notes that similar concentration is present in non-asbestos suits as well as asbestos. *Id.* at 26. Within industries, there was a significant degree of concentration in the motor vehicle and pharmaceutical/health product industries but considerable dispersion in other industries. *Id.* at 28.

58. As an insurance industry study indicates, most sizable claims of the type that make up federal court cases are pursued through the filing of a lawsuit. In a study of claims in excess of $100,000 closed in 1985, only four percent of the claimants had not filed a lawsuit. L. SOULAR, A STUDY OF LARGE PRODUCT LIABILITY CLAIMS CLOSED IN 1985 (1986).

product liability cases make up only two or three percent of the tort cases in state courts. For example, a National Center for State Courts study found that in one month in 1988 product liability made up 2.1% of tort filings in twenty-four large urban trial courts.[59] That year product liability cases were thirty-six percent of tort filings in the federal courts.[60]

We can infer that a sizable portion of product liability litigation takes place in the federal courts. The prominence of federal courts in the world of product liability is shown by a General Accounting Office study that examined product liability litigation for the years 1983 through 1985 in five states. It found that forty-six percent of the cases tried to verdict were tried in the federal courts.[61] It appears that federal courts are the site of one third or more of all product liability litigation.[62] Since the federal cases on the whole involve higher stakes, it is probable that most of the money that is awarded in product liability cases is awarded in the federal courts.

It is possible that while federal filings have been going down, state filings have increased. Again, the available information is extremely sketchy. The best account of the relation between federal and state filing rates was an earlier study by the General Accounting Office, comparing data on two products and on two states, concluding that "state court filings matched federal court filings in the direction of change" and that there was "a trend toward filing in federal court[s]."[63] I know of no reason to believe that these observations are atypical or that this pattern has

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59. David Rottman, *Tort Litigation in the State Courts: Evidence from the Trial Court Information Network*, 14 STATE CT. J. 4, 8 (1990). In 1986, product liability cases were 2.3% of the tort filings in the Florida courts. Donald G. Gifford, *Litigation Trends in Florida: Saga of a Growth State*, 39 U. FLA L. REV. 829, 849 (1987). That year product liability cases made up 27% of the federal tort filings. A recent study of tort cases tried to verdict in 36 urban state trial courts showed 3.4%. Brian Ostrom & David Rottman, *Does Plaintiff and Defendant Status Matter? A Comparison of Outcomes in Tort Litigation*, National Center for State Courts (1991). Product liability cases were 2.9% of tort filings in Iowa. Robert Tobin et. al., *Iowa Tort Liability Study* (National Center For State Courts, 1986) (copy on file with the author).

60. It should be noted that these comparisons do not separate out asbestos cases, since none of the state figures enable us to make such a separation—but if we restricted our count only to non-asbestos product liability cases, these made up some twelve percent of all federal tort filings in 1988.

61. U.S. GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES (GAO/HRD-89-99). Asbestos cases were less than one percent of the verdicts. *Id.* at 90. An earlier GAO study found that federal cases were thirty-two percent of the product liability filings in Connecticut from 1979 to 1986 and twenty-two percent of those filed in Iowa in three years from 1981 to 1985. U.S. GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: EXTENT OF "LITIGATION EXPLOSION" IN FEDERAL COURTS QUESTIONED, 36-38 (GAO/HRD-88-36BR) [hereinafter LITIGATION EXPLOSION].

62. Extrapolating from the 1988 Trial Court Information Network terminations, Professors Eisenberg and Henderson estimate that federal courts account for about thirty-nine percent of all product liability terminations. Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 U.C.L.A. L. REV. 731, 739 (1992).

63. "We had sufficient data to compare trends in state courts and federal courts for cases related to Dalkon Shield and Bendectin filed nationwide, all product liability cases filed in Connecticut, and all product liability cases (other than those related to contracts) in Iowa. For all four sets of data, state court filings matched federal court filings in the direction of change (that is, whether they increased or decreased), but not necessarily in the rate or extent of growth. A trend toward filing in federal court was apparent." LITIGATION EXPLOSION, *supra* note 61, at 32.

changed and that filings in state courts are now moving in the opposite direction from those in federal courts.

Two sets of figures compiled by the National Center of State Courts confirm this impression. The first are figures for product liability filings in courts in five states for varying periods since 1985 that reveal no general upward trend or downward trend in state filings.[64] The second set of figures traces separately the number of automobile torts and non-automobile torts filed in the courts of seven states from 1985 to 1990. Again, the number of non-automobile torts, which includes all product liability cases, is essentially flat, while the number of automobile torts increased over this period.[65] Although the evidence is fragmentary, it provides no support for the view that there has been a significant increase in product liability filings in state courts.

In the federal courts, which have been the heartland of product liability litigation, there has been a significant decline in filings relevant to the vast majority of companies. There is no evidence from which to conclude that there has been an offsetting increase in product liability claims in state courts. The decline in product liability filings fits together with a number of other things that suggest that the world of product liability claims is contracting rather than growing. First, Professors Henderson and Eisenberg found that after the early 1980s plaintiffs were less successful at trial and defendants secured favorable opinions from courts in an increasing portion of cases.[66] Second, Professors Rustad and Koenig, tracing the number of punitive damage awards in product liability cases in both state and federal courts, discovered that there were many fewer punitive awards in product cases than is often assumed. They also found that the number of punitive awards have followed the same pattern as federal court filings. From the early 1980s (1981-85) to the late 1980s (1986-90), the number of known punitive damage awards in asbestos cases increased

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64. Communication from Dr. Brian Ostrom, Director, Court Statistics Project, National Center for State Courts. The five states are Connecticut, Florida, Massachusetts, Nevada, and Ohio. These are the only states for which product liability is separated out from other tort filings. These state figures include asbestos as well as other product liability cases. In four of the five states the 1991 figure was lower than the first year in the series. In the fifth state, Florida, a substantial 1991 increase (from 1300 in 1990 to 2472) was attributable to a batch of 1113 asbestos cases filed together by a single attorney.

65. The states in this compilation are Arizona, California, Connecticut, Hawaii, Maryland, Michigan and Texas. The seven-state total for non-automobile torts was:

1985	93,818
1986	103,514
1987	100,335
1988	98,438
1989	94,988
1990	99,144

During this period automobile tort filings rose from 113,924 to 150,116. Figures supplied by Dr. Brian Ostrom, Director, Court Statistics Project, National Center for State Courts.

66. James Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990). They adduce further evidence of these trends in Theodore Eisenberg & James Henderson, *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992). "[T]he major story in our data [is] the steadily declining [plaintiff] success rates, the level median pretrial awards, and the post-1985 declines in awards, expected returns, and sums of awards . . . " *Id.* at 789.

by 265% (from twenty to ninety-five); but known awards in non-asbestos cases decreased thirty-four percent (from 119 to seventy-eight) in those same years.[67]

Third, there are not only fewer awards and fewer lawsuits; there are fewer claims. A report by the General Accounting Office finds that the number of claims per $100,000 of product liability premiums dropped from 32.9 in 1984 to 17.1 in 1988, a forty-eight percent decrease.[68] Finally, a recent insurance industry study found that the rate of expansion of paid claims under general liability coverage dropped from 21.1% annually from 1978 to 1985 to 7.8% in the 1986-1990 period, a rate close to the rate of growth in costs, such as medical care, which increased at a 7.5% rate over the same period.[69]

These studies depict a sustained contraction of product liability exposure rather than the runaway expansion that alarms adherents of the jaundiced view of civil justice. Apart from calling into question the supposed mounting litigiousness of the American people, this contraction should induce skepticism about the asserted role of product liability litigation in undermining the competitiveness of American business.

It is possible that the civil justice system undermines the competitiveness of American business even though product liability is contracting. Suppose that the burden imposed by the civil justice system is such that even in this reduced state, it causes American industry to be less competitive. Is there any direct evidence of a connection? So far, serious investigation has found little evidence of any significant effect on America's prosperity.[70]

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67. MICHAEL RUSTAD, DEMYSTIFYING PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES: A SURVEY OF A QUARTER CENTURY OF TRIAL VERDICTS (1991) This research was also presented in Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 IOWA L. REV. 1 (1992). *See also, Product Liability, Hearings on S.640 Before the Subcomm. on Consumer of the Senate Comm. on Commerce, Science and Transportation*, 102nd Cong., 1st Sess. 144-152 (1991) (statement of Michael Rustad, Professor of Law, Suffolk University Law School).

The researchers compiled data on all punitive damage awards in product liability cases on the basis of a search of "all available computer-based statistical sources, regional verdict reporters, law review and other scholarly sources, state products liability practice guides, generalized case-reporting services, court records, asbestos reporters and media reports. In addition . . . all attorneys in reported cases were surveyed, to locate further cases." *Id.* at 146-47. They located a total of 355 punitive damages verdicts in state and federal courts. *Id.*

Despite the admirable thoroughness of these researchers, no doubt they missed some punitive damage awards. But since their method makes it more likely that cases would be missing in the earlier period than in the later, the reliability of their non-asbestos trend data is strengthened rather than weakened by the missing data.

68. GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: INSURANCE RATE LEVELS AND CLAIM PAYMENTS DURING THE 1970S AND 1980S (GAO/HRD-91-108) (1991).

69. S. MOONEY, CRISIS AND RECOVERY: A REVIEW OF BUSINESS LIABILITY INSURANCE IN THE 1980S 16 (1992).

70. Product liability and civil justice do not loom large in the general literature on competitiveness. In his 831 page opus, THE COMPETITIVE ADVANTAGE OF NATIONS, Michael E. Porter devotes less than half a page to product liability, observing that

> A prominent example of an area where regulatory policy can work for or against national advantage is *product liability*. Product liability laws can benefit competitive advantage by acting like a sophisticated buyer to encourage the development of better products.

Reviewing the available data on the relation of liability to trade performance, Robert Litan of the Brookings Institution identified two major lines of argument: (1) that liability adds to the cost of doing business, and (2) that "[t]hese costs, coupled with uncertainty over outcomes of tort litigation . . . [deter introduction of] new products or cost-saving production technologies."[71]

Litan concludes that it is difficult to know the magnitude of the net cost of liability but estimates that "[a]t most that [cost] on average could be as high as 2 percent of the cost of all products and services sold in the United States. The effects on individual products could be much greater."[72] Although "it could affect the composition of United States trade," he reports that "[i]t is highly unlikely that the 'liability tax,' however large it is, materially or permanently affects the overall U.S. trade balance."[73]

Litan himself assembled data on the total "share of revenues [spent by particular industries] devoted to paying for and avoiding 'risk.'"[74] These risk costs vary widely from industry to industry and they vary over time. Notably, the overall expenditure on risk costs as a share of revenues *declined* from a total of .58% (fifty-eight one-hundredths of one percent) of total revenues for the whole set of industries in 1978 to .50% (fifty one-hundredths of one percent) of total revenues in 1984.[75] It should be recalled that the mid-1980's was just when non-asbestos product liability litigation was at its peak.

To see whether differences in risk cost can account for "any of the cross industry variation in export performance" Litan tests the correlation for "the seven industries for which both export and risk cost data are available" and finds no statistically significant relationship.[76] Litan observes

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He continues, without providing any supporting evidence:

> In the United States, however, product liability is so extreme and uncertain as to retard innovation. The legal and regulatory climate places firms in constant jeopardy of costly and, as importantly, lengthy product liability suits. The existing approach goes beyond any reasonable need to protect consumers, as other nations have demonstrated through more pragmatic approaches.

MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 649 (1990). A 1991 report of the congressional Office of Technology Assessment, analyzing the competitiveness of American manufacturing, doesn't even mention product liability. U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, COMPETING ECONOMIES: AMERICA, EUROPE, AND THE PACIFIC RIM, (OTA-ITE-498) (1991).

71. Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities, in* TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION AND CONSUMER WELFARE 127, 128 (Peter H. Schuck ed., 1991). Studies of the impact of liability in five industries are in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Peter W. Huber & Robert E. Litan, eds., 1991).

72. *See* Litan, *supra* note 71 at 128-29. It is estimated, however, that all product liability insurance premiums in 1991, adjusted to include self-insurance and other risk mechanisms, added up to about .21 (twenty-one one-hundredths of one percent) of the total retail sales of products in the United States in 1991. NATIONAL INSURANCE CONSUMER ORGANIZATION, PRODUCT LIABILITY: 1991 CALENDAR YEAR EXPERIENCE 3-4 (1992).

73. *See* Litan, *supra* note 71, at 128.

74. *Id.* at 140.

75. *Id.* at 141. The information is taken from the table on page 141. The data in the table is misreported in the first full sentence of page 142.

76. *Id.* at 143.

that "[i]t is not surprising that there is little connection between liability costs and export performance by industry" since differences in risk costs are "rather minor" and can easily be swamped by other effects, such as changing energy costs. He notes, too, that "foreigners may be willing to pay for the added safety that may be built into U.S. produced goods as a result of the deterrence features of our tort system."[77]

Litan suggests that the effects on innovation "are potentially much larger but much more uncertain" than the direct cost effects.[78] An analysis by Viscusi and Moore found that product liability actually had a positive net effect on innovation:

> This effect is not uniform and may reverse once the liability costs become too great. At low product liability cost levels, increases in liability costs foster innovation. Extremely high liability costs depress innovation once the disincentive effect on new product introductions becomes dominant. For industries with extremely large liability costs . . . the net effect of product liability is to depress innovation, whereas for the great majority of firms with lower liability costs, it has a positive effect.[79]

Litan examined the relation of research and development expenditures as a percentage of sales (a surrogate for innovation) for all United States industries and for the four industries that were the target of the largest number of federal product liability suits from 1974 to 1986. He reports that the results:

> [d]o not support the alleged innovation-liability link. R&D-to-sales ratios for all industries increased rather substantially during the 1980s . . . significantly, that ratio more than doubled in the drug industry, where product liability suits have been especially prevalent. Both the industry-wide and pharmaceutical-specific trends are inconsistent with claims that liability fears have dampened innovative activities.[80]

Litan also refers to "[s]urvey evidence [that] suggests that the negative effects [of the tort system] on innovation are significant."[81] Apparently he is referring to a much-ballyhooed 1988 report of the Conference Board, an item frequently used as a principal exhibit of the adverse effects of product liability litigation. (For example it was put forth by the Council on Competitiveness as its prime example of "the adverse effects of uncon-

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> Among the seven industries for which both export and risk cost data are available, there is a small, but statistically insignificant, positive correlation between the change in exports between 1978 and 1984 (either in absolute dollars or in percentage terms) and the change in the risk cost as a percentage of sales in those industries during this period. In other words, increases in risk costs tend to be associated with an improvement in export performance, although again this effect is not statistically significant.

Id.

77. *Id.* at 143.

78. *Id.* at 129.

79. W. Kip Viscusi and Michael J. Moore, *Rationalizing the Relationship between Product Liability and Innovation, in* TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION AND CONSUMER WELFARE 105, 123 (Peter H. Schuck ed., 1991).

80. *See* Litan, *supra* note 71, at 145-46.

81. *Id.* at 129.

strained litigation.").[82]

It should be noted that there were two Conference Board surveys on product liability that appeared in rapid succession in 1987 and 1988. The first of these (the Weber report) was a survey of "the risk managers of 232 major U.S. corporations . . . each having a minimum annual sales revenue of $100 million . . . ."[83] Written in November 1986—at the very height of the furor about insurance coverage and cost[84]—the report took a cool, detached view, totally rejecting the notion that there was a major liability crisis. It reported its "most striking finding is that the impact of the liability issue seems far more related to rhetoric than to reality."[85]

> For the major corporations surveyed, the pressures of product liability have hardly affected larger economic issues, such as revenues, market share, or employee retention. Liability lawsuits, which are indeed numerous, are overwhelmingly settled out of court, and usually for sums that are considered modest by corporate standards. As a management function, product liability remains a part-time responsibility in most of the responding firms. Where product liability has had a notable impact—where it has most significantly affected management of decision making—has been in the quality of the products themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit.
>
> . . . .
>
> The findings of the present survey also refute the general contention of a severe and deepening crisis in tort liability and insurance availability, at least for the nation's large corporations. The impact on the general economy, likewise, is believed to have been minor.[86]

Surprise with the sanguine response of the Weber respondents (and of Weber) led the Conference Board to undertake "a broader look at the effect of product liability on overall company operations" by surveying the chief executive officers of the 2,000 largest manufacturing companies and a sample of smaller manufacturers.[87] The resulting report (the McGuire report) was issued in 1988. In contrast to the risk managers, the CEO's had a very dark view of the liability situation. Forty-two percent reported that the product liability system had a major impact on their firms;[88] forty-seven percent report that they had discontinued product lines, thirty-nine percent that they had decided against introducing new

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82. AGENDA, *supra* note 2, at 3.

83. NATHAN WEBER, PRODUCT LIABILITY: THE CORPORATE RESPONSE REPORT NO. 893 (1987).

84. Robert Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony, and the Great American Liability Insurance Famine of 1986, in* 11 STUD. IN LAW, POL. & SOC. 95 (1991).

85. *See* WEBER, *supra* note 83, at 2.

86. *Id.*

87. E. PATRICK MCGUIRE, THE IMPACT OF PRODUCT LIABILITY. REPORT NO. 908 (1988).

88. *Id.* at 6.

products;[89] and forty-nine percent reported a major impact on international competitiveness.[90]

How can we account for the startling discrepancy in perceptions revealed by these two surveys of corporate actors? The range of corporations was slightly different: the risk manager survey included some service corporations as well as manufacturers; the CEO survey included small as well as large corporations. Yet these do not seem to be the crucial factors. Both surveys had very low response rates,[91] so one possibility is that they exercised contrasting selection effects, attracting sanguine risk managers and distressed CEOs respectively. Or perhaps they accurately reflected the perspectives generated at different locations in the corporation. The CEO figures probably represent sentiments that are widespread among American business executives. An early 1992 survey of executives by *Business Week* found that sixty-two percent felt "that the U.S. civil justice system significantly hampers the ability of U.S. companies to compete with Japanese and European companies . . . ."[92] Of course these impressions are not in themselves evidence of the existence or magnitude of these effects. But they are part of the story. It is entirely possible that this pessimism translates into lower expectations and less success. Which makes even more remarkable the absence of independent evidence for the depressing effects.

IV. THE MISSING KNOWLEDGE BASE

In the end the competitiveness argument only restates the question of the performance of the United States liability system—a question about the net cost of the system and its benefits and about the costs and benefits of the realistic alternatives. We are in the dark—not because there are a few missing items of information, but because we do not have the needed knowledge base. The most basic data about our civil justice system are not collected systematically and cumulatively. That baseless fictions about the number of lawyers, cursory surmises about the costs of the civil justice system, unfounded notions about product liability litigation and fables about damaged competitiveness continue to be taken seriously testifies both to the paucity of information and to a widespread disinclination to employ the information we do have.

Why do we tolerate a knowledge base about the legal system that is so thin and spotty? Compared to the economy or health care or education,

89. *Id.* at 20.

90. *Id.* at 8.

91. The McGuire study received 270 usable responses from a mailing to the 2000 largest U.S. manufacturing companies and 280 responses from a separate mailing to 2000 smaller manufacturers, for an overall rate of 13.8%. *See* MCGUIRE, *supra* note 87, at ix-x. The Weber study does not report its response rate. E. Patrick McGuire, who supervised the Weber study, recalled that the response rate was about twenty percent. Telephone Interview with E. Patrick Maguire (Jan. 28, 1988).

92. *The Verdict from the Corner Office*, BUS. WK, April 13, 1992, at 66. This was a survey conducted by Louis Harris & Associates Inc., in early 1992, of 400 senior executives at corporations drawn from the "Business Week Top 1000" companies. *Id.*

research about legal processes, especially civil, is ludicrously thin; so thin that it is perfectly routine for far-reaching policy proposals to be advanced on the basis of tendentious macro-anecdotes and voodoo numbers. The fund of basic information that we take for granted in discussions of the economy, health care or education simply does not exist. To maintain credibility in public debate about education or health or defense, participants have to critically take account of a shared fund of information. Players in the legal policy arena, however, can with impunity disregard reliable information, make up dubious facts and repeat discredited fables. Anything goes, it seems.

The derelict state of the discourse about legal policy is surprising because lawyers, in their role as adversaries, are dogged in challenging and dissecting evidence. But adversarial contention is not the same as delighting in employment of the most severe critical standards. And acuteness in dealing with evidence and inference in specific cases does not necessarily carry over to analysis of large social aggregates. For example, a careful study showed that South Carolina lawyers were not much better than the state's doctors in estimating the number, size, and patterns of jury verdicts in that state.[93]

But what about our vast archipelago of law schools, whose professors and students fill hundreds of journals with the products of legal scholarship? This great flood of scholarship does not provide an adequate knowledge base, because, basically, it is not interested in the working of the legal system. Speaking of the "extraordinary imbalance in academic legal research," Judge Posner noted:

> [A]n attitude of complete neglect to what is after all the great story of American law in the modern era, and that is the extraordinary growth in the size of the profession since 1960 accompanied by an extraordinary increase in the volume of litigation and other legal activities. We do not have in the academy a significant, cogent body of thinking about why this had occurred and what the consequences are.[94]

We think of the contemporary legal academy as the inheritor of the legal realist concern for the law in action, but the incorporation of legal realist insights has been selective: legal scholarship fervently embraced the critical deconstruction of texts,[95] but remained diffident toward the investigative, empirical side of the realist legacy.[96]

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93. Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 S.C. L. REV. 585 (1988).

94. Richard A. Posner, *The Uncertain Future of Legal Education, Address Before the Annual Meeting of the Association of American Law Schools* (January 15, 1991) p. 6.

95. Some have voiced alarm at the textual deconstruction that has become increasingly fashionable in the law journals. But post-modern fashions have made such headway not because of their difference but because of their kinship with mainstream scholarship with which they share the premise that the main thing is to achieve the right verbal formula, as if words control reality.

96. The patron saint of this side of our legal heritage is Louis Brandeis, whose devotion to disciplined exploration of the world and disdain for speculation uninformed by such inquiry is displayed in an episode recounted by biographer Philippa Strum:

Brandeis recalled having told [Justice Oliver Wendell] Holmes "that if he really

Abetted by the bar, law schools have largely defaulted on their responsibility to contribute to knowledge about the working of the legal process. It is as if we had a medical establishment consisting entirely of practicing physicians and theoretical biologists, with no research institutions like the National Institutes of Health and no public health monitoring facilities like the Centers for Disease Control!

Overall, legal institutions, including the legal profession, invest very little in research and development. No one knows how much. In 1987 the income of the legal services industry, as the Census refers to us, was sixty-seven billion dollars—about one and a half percent of the Gross Domestic Product.[97] That does not include expenditures for in-house law departments or government law departments or for courts or law schools. How much is spent each year on research about civil justice? There is no data from which a reliable estimate can be derived. From very partial data and with very crude assumptions, I have constructed a "guesstimate" of something like sixty-six million dollars that surely errs on the side of generosity.[98] That is less than one tenth of one percent of total expenditures on legal institutions. And it is an even smaller fraction of the one hundred fifty billion spent annually on research in this country.[99]

> wanted to improve his mind" (as he always speaks of it) the way to do it is not to read more philosophic books . . . but to get some sense of the world of fact. And he asked me to map out some reading—he became much interested—and I told him that I'd get some books, that books could carry him only so far, and that then he should get some exhibits from life. I suggested the textile industry, and told him in vacation time he is near Lawrence and Lowell and he should go there and look about.

PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 309-10 (1984). Holmes' response was that "I have little doubt that it would be good for my immortal soul to plunge into them [facts] . . . but I shrink from the bore." *Id.* at 310. Like Holmes, the legal academy has followed the enchantments of text rather than the Brandeisian imperative of disciplined examination of context. So law journals religiously check accuracy of quotations, but tolerate casual assertions about the state of the world.

97. U.S. CENSUS OF SERVICE INDUSTRIES, LEGAL SERVICES, tbl. 42 (1987).

98. This very rough estimate was constructed in the following way. Under my supervision, J.T. Knight collected the latest available annual research budgets of most of the most prominent (to me) public and private funders of research on civil justice. We obtained figures for the Federal Judicial Center ($2.3 million), the National Science Foundation Program in Law and Social Science ($2.4 million), the National Center for Dispute Resolution ($0.8 million), the American Bar Foundation ($2.2 million), the National Center for State Courts ($4.2 million), the Olin Foundation ($2.8 billion), the William and Flora Hewlett Foundation's Program in Conflict Resolution ($3.0 million), the Administrative Conference of the United States (entire budget $1.9 million), RAND Institute for Civil Justice (entire budget $2.3 million). The total for these nine institutions is $22.1 million. This total includes the entire budget of several of these institutions; it is further exaggerated by the assumption that all of this research is on civil justice and by the absence of any adjustment for the double-counting that is involved when one of these institutions supports research by another.

I then make the extremely optimistic assumption that there is another set of non-university institutions, less visible to me, whose annual spending is equivalent to this extremely optimistic total for civil justice research expenditures by these nine institutions. I then make the further extravagantly optimistic assumption that in law schools and other university settings, there is a further equivalent expenditure on civil justice research that does not derive from either of these two sets of institutions. (That this is heroically optimistic is indicated by considering that $22 million would pay for well over two hundred full time equivalent senior researchers.) With all these favorable assumptions, the total expenditure on civil justice research would be a bit more than $66 million.

99. NATIONAL SCIENCE BOARD, SCIENCE AND ENGINEERING INDICATORS Fig. 4-1 (1991).

Lawyers have created in the civil justice system a powerful engine of remedy and change, but display little sense of collective responsibility to support the knowledge base needed to modify and wield it for public good. Such a knowledge base will not provide definitive answers to questions of policy, for lawyers reflect the conflicting views of their clients, so we should not imagine that we can come up with neutral and purely technical answers. Civil justice issues involve value choices—and that means political choices. But an enhanced knowledge base can rescue us from a debate dominated by bogus questions and fictional facts.

It is not only about our own legal system that we lack information. Much of the denigration of our system is couched in misleading comparisons. Detractors ignore differences in the institutional setting and role of legal institutions. Trends that are widespread throughout the industrialized world are treated as if they were peculiarly American and, moreover, manifested pathological flaws in American society. Recent decades have witnessed a dramatic worldwide legalization of social life, including an increase in litigation and in the number of lawyers—even in Japan, which is so often falsely portrayed as a land without litigation and lawyers. As globalization proceeds, the legal systems of various countries will interact more intensively. We need to develop a reliable knowledge base that will enable us to make meaningful cross-national comparisons as well as track developments in our own legal system.

Notwithstanding the deficiencies of our legal system, it is worth recalling that one realm in which the United States has remained the leading exporter is what we may call the technology of doing law—constitutionalism, judicial enforcement of rights, the organization of law firms, alternative dispute resolution and public interest law. For all their admitted flaws, American institutions provide influential models for the governance of business relations, the processing of disputes, and the protection of citizens.

The legal system that we inhabit is expanding rapidly and is being reshaped by both new technologies within, and the demands of a changing world without. The legal system is one of the mechanisms by which society monitors and regulates the world of incessant change. The efficacy of the legal response depends not only on the quality of our knowledge about the world, but on our understanding of the legal system as well. The absence of an adequate knowledge base not only impairs the optimal use of the legal system, but also makes the legal profession vulnerable to attack.

The hostility toward lawyers so much in evidence today has much deeper sources than the deficiencies of our knowledge base. It is deeply rooted in society's fundamental ambivalence about law and is accentuated by the discomforts of the increasing legalization of society. Our system of civil justice is beset by many problems, particularly problems of securing justice cheaply and expeditiously for all Americans. But we should be mindful of the accomplishments as well as the discomforts. Increasingly, ordinary people can use this system to hold to account society's managers

and authorities. It is this "litigation up" that fuels the sense of outrage of so many well-placed critics by challenging the leeways and immunities enjoyed by those in charge.

APPENDIX

ESTIMATED LAWYER POPULATIONS IN VARIOUS COUNTRIES

MARC GALANTER AND J.T. KNIGHT*

The following table summarizes the number of lawyers in all countries for which usable data could be found. Data was unavailable for many countries, including much of Latin America, Eastern Europe, the Middle East, Southeast Asia, and Africa.

Counting the number of lawyers in the world presents a difficult task for several reasons. Not only is data unavailable for many countries, but lawyers are defined differently from country to country. In some, there is more than one professional group corresponding to the omnibus category of lawyer used in the United States. Boundaries may be defined differently: in some places government legal officers, judges, prosecutors, law teachers, and corporate law officers are considered "lawyers;" in others, they are not. Totals from bar associations may be inflated or may exclude non-members. Finally, it is difficult to account for retired lawyers and persons with the requisite educational credentials not presently working in recognized "lawyer" jobs, who are included in some counts but not in others.

To maximize temporal comparability, we have used data for 1985 or a year as close as possible to 1985. Obviously, these enumerations vary in reliability as well as in coverage. Where more than one estimate was available, all are given. If there is a basis for preferring one source on grounds of reliability or inclusiveness, it is indicated by bold type.

COUNTRY	REPORTED NUMBER OF LAWYERS	DATE	SOURCE
Algeria	800	1983	A
Argentina	50,000	1983	A
Australia	23,000	1985	B
	21,640	1985	C
	7,068	1983	A
Austria	2,400	1987	D
	2,200	1983	A
Bangladesh	15,000	1984	E
	9,000	1983	A
Belgium	24,000	1984	**F**
	21,104	1985	G
	12,300	1983	A
(Source F is preferred because this source breaks down lawyers by practice setting and includes government lawyers, judges, etc.)			

* J.D., University of Wisconsin, 1993; Clerk to Magistrate Stephen Crocker, U.S. District Court (W.D. Wis.), 1993-94.

Brazil	168,245	1980	H
	85,716	1981	G
	500,000	1989	I

(Source I is not used in any estimate because this unconfirmed figure is improbably large. *See* note 10, *supra.*)

Canada	42,710	1986	J
	40,000	1983	A
	34,205	1985	G
	32,500	1990	K

(Source J is preferred because this source provides comprehensive analysis of law practice in Canada including lawyers and notaries.)

Chile	12,300	1983	A

China	47,461	1990	L
	30,000	1985-88	M

(Source L is preferred because this source distinguishes by types of practice)

Costa Rica	1,959	1983	A

Denmark	3,000	1983	A

Egypt	30,000	1983	N

(Source N refers to members of the Egyptian Bar Association.)

England & Wales	51,857	1985	O
	45,500	1985	P

(Both sources include both solicitors and barristers.)

Finland	10,614	1983	B
	9,000	1983	A

France	27,700	1990	G
	27,215	1983	A
	26,029	1983	Q

(Sources G and A include lawyers in private practice only. Figure Q excludes notaries and bailiffs.)

Germany (East)	2,035	1990	P

(Source P includes private practice and judges.)

Germany (West)	116,000	1985	R
	101,700	1984	S
	47,359	1985	G
	43,100	1983	A

(Source R is preferred because this source is inclusive of all practice settings.)

Hong Kong	1,800	1989	T
	1,332	1983	A

India	247,373	1983	U
	225,000	1983	A
(Source U is information obtained from regional bar councils, including members of the Bar Council of India)			
Ireland	2,500	1983	A
Israel	7,500	1983	A
Italy	46,600	1983	A
	46,401	1985	G
	32,468	1982	V
(Sources A, G and V include lawyers in private practice only.)			
Japan	124,000	1989	W
	122,000	1980	X
	100,000	1987	Y
	95,342	1982	Z
Jordan	700	1983	A
Kenya	1,000	1991	AA
Malaysia	2,600	1988	BB
Nepal	1,000	1983	A
Netherlands	5,124	1986	CC
	4,000	1983	A
New Zealand	4,149	1981	DD
	4,149	1981	K
Nigeria	2,000	1983	A
Norway	6,572	1980	EE
	4,412	1970	G
	2,100	1983	A
(Source G is preferred because this source includes all practice settings.)			
Pakistan	70,000	1982	FF
	22,000	1983	A
Panama	900	1983	A
Scotland	7,270	1982-84	GG
	6,350	1985	G
(Sources GG and G include solicitors, advocates in private practice and government lawyers)			
Singapore	990	1983	A
South Africa	5,700	1986	HH
(The data for Source HH is incomplete.)			
Spain	55,000	1983	A
	34,234	1985	B
	42,000	1982	II
(Source B is preferred because this source includes judges and government lawyers.)			

Sweden	2,064	1964	B
(Source B includes private practice and government.)			
Switzerland	3,688	1980	JJ
	3,300	1983	A
Turkey	22,395	1987	P
	18,000	1983	A
United States	655,191	1985	KK
	618,800	1985	LL
(Source KK is preferred because this source is an authoritative count enumerating lawyers by practice setting.)			
U.S.S.R.	207,000	1986	MM
	100,000	1989	NN
Uruguay	300	1983	A
Venezuela	31,400	1990	K (at n.7)
	15,000	1980	OO

CALCULATION OF UNITED STATES' SHARE OF WORLD'S LAWYERS

Methodology of Calculations: The average of all available figures for each country is used except in cases where one seems clearly preferable. "Best available" figures are indicated in bold because those sources provide more specificity about the nature of law practice in a particular country, and/or provide a better basis for comparative analysis.

The average of available figures is calculated by dividing the sum of all figures available for a particular country by the number of sources. The "highest" estimate is calculated by using the highest reported figure for each country. The "lowest" estimate is calculated by using the lowest reported figure for each country.

For all estimates, the figure taken from source KK is the only United States estimate used. In all calculations, the figure taken from source I (for Brazil) is excluded.

ESTIMATE A.

NUMBER OF LAWYERS IN THE WORLD, BASED ON BEST AVAILABLE FIGURES REPORTED

Total lawyers ..... 1,908,844 (plus lawyers in unreported countries)

Percent of total in U.S. .....34.3% (without adjustment for unreported countries)

Where there are multiple sources and none is preferred, computation is on the basis of the average of available figures.

ESTIMATE B. NUMBER OF LAWYERS IN THE WORLD, BASED ON AVERAGE FIGURES REPORTED

Total lawyers ..... 1,851,588 (plus lawyers in unreported countries)

Percent of total lawyers in the U.S..... 35.4% (without adjustment for unreported countries)

In *all* cases (other than the U.S.) where there are multiple sources, computation is based on the average of available sources.

ESTIMATE C. NUMBER OF LAWYERS IN THE WORLD, BASED ON HIGHEST FIGURES REPORTED

Total lawyers ..... 2,065,838 (plus lawyers in unreported countries)

Percent of total in U.S. .....31.7% (without adjustment for unreported countries)

ESTIMATE D. NUMBER OF LAWYERS IN THE WORLD, BASED ON LOWEST FIGURES REPORTED

Total lawyers ..... 1,646,573 (plus lawyers in unreported countries)

Percent of total in U.S. 39.8% (without adjustment for unreported countries)

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